IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE K.THANKAPPAN

MONDAY, THE 20TH AUGUST 2007 / 29TH SRAVANA 1929

CRL.A.No. 1854 of 2004(C)

SC.217/2003 of ADDITIONAL DISTRICT AND SESSIONS FAST TRACK (AD HOC II), KOZHIKODE)

.....

APPELLANT: ACCUSED

PADMANABHAN NAIR S/O. CHATHUKUTTY NAIR,
AGED 55 YEARS, OOLANKUNNATH VEEDU,
PANANGAD AMSOM DESOM, QUILANDY TALUK.

BY ADV. SRI.SUNNY MATHEW

RESPONDENT: COMPLAINANT

THE STATE OF KERALA THROUGH
THE EXCISE INSPECTOR, BALUSSERY,
REPRESENTED BY THE PUBLIC PROSECUTOR,
HIGH COURT OF KERALA, ERNAKULAM.

BY PUBLIC PROSECUTOR SRI. THOMAS JOHN AMBOOKKAN

THIS CRIMINAL APPEAL HAVING BEEN FINALLY HEARD ON 20/08/2007, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

ORDER IN CRL.M.A. NO.3263 OF 2004 IN CRL. APPEAL NO. 1854 OF 2004.

DISMISSED

20.8.2007 Sd/-(K.THANKAPPAN, JUDGE)

K.THANKAPPAN, J.

CRL. APPEAL NO. 1854 OF 2004

Dated this the 20th day of August, 2007

JUDGMENT

This appeal is filed by the accused in S.C. No.217 of 2003 on the file of the Additional District and Sessions Court, Fast Track (Ad hoc II), Kozhikode. He faced trial for the offence punishable under Section 55(a) of the Abkari Act.

2. The prosecution case against the appellant - accused was that on 2.8.2000 at about 5.45 p.m., the accused was found carrying 1.5 litres of illicit arrack in a plastic bottle and a 150ml. glass through Chathoth Lakshamveedu Colony. To prove the case against the accused, the prosecution examined PWs.1 to 6 and produced Exts.P1 to P10 as well as MOs.1 and 2. No oral or documentary evidence was adduced on the side of the defence. After closing the prosecution evidence, the accused was questioned under Section 313 Cr.P.C. He denied the charges levelled against him and stated that the case was foisted against him. However, the trial court, relying on the evidence adduced by the prosecution, found the

appellant guilty under Section 55(a) of the Abkari Act, convicted him thereunder and sentenced him to undergo rigorous imprisonment for one and a half years and to pay a fine of Rs.1,00,000/- and in default of payment of fine, to undergo simple imprisonment for a further period of six months. The appellant was also given the benefit under Section 428 Cr.P.C. The above conviction and sentence are challenged in this appeal.

3. This Court heard the learned counsel appearing for the appellant as well as the learned Public Prosecutor.

4. Learned counsel appearing for the appellant has raised the following contentions in challenging the judgment of the trial court: (i) the trial court committed serious error in finding the appellant guilty under Section 55(a) of the Abkari Act relying only on the evidence of the official witnesses as the independent witness turned hostile to the prosecution, (ii) even if the evidence of the official witnesses is believed and the documents produced by the prosecution is accepted, the finding of the trial court that the appellant committed offence punishable under Section 55(a) of the Abkari Act is not legally tenable in the light of the decisions of this Court reported in **Surendran v. Excise Inspector, 2004(1) K.L.T. 404** and **Sudhepan @ Aniyan v. State of Kerala, 2005(2) K.L.D.(Cri) 631** and

(iii) the sentence awarded against the appellant is excessive.

5. The trial court relied on the evidence of the official witnesses to find the appellant guilty of the offence alleged against him. PW.1 was the Circle Inspector of Excise attached to the Excise Special Squad, Kozhikode who detected the offence. He deposed before the court below that while he was on patrol duty along with the excise party, he saw the accused carrying a plastic bottle and a glass and on examining the bottle it was found that the capacity of the bottle was 1.5 litres and that it contained 1.5 litres of illicit arrack. He further stated that he took 200 ml. of illicit arrack in a 375 ml. bottle as sample, sealed the same and seized the sample and the residue in the presence of witnesses as per Ext.P3 seizure mahazar. This witness further stated that he arrested the accused on preparing Ext.P1 arrest memo and produced the accused and the thondy articles before the Excise Officer, Balussery Excise Range. PW.2 was the Excise Inspector attached to Kozhikode Anti-Narcotic Section. He stated that he had accompanied PW.1 on the date of the incident. He corroborated the evidence of PW.1. PW.5 was the Excise Inspector attached to Balussery Excise Range. He stated that he conducted investigation of the case, questioned the witnesses, recorded their statements and laid the charge sheet. PW.6 the then Excise Inspector,

Balussery stated that the accused, thondy articles and the records were produced before him by PW.1 on 2.8.2000 at 7.25 p.m. and that he prepared the occurrence report and registered the crime against the accused. He further stated that the accused and the thondy articles were produced before the court on the next day and he prepared the forwarding note to sent the sample for chemical analysis. Ext.P10 is the chemical analysis report which showed that the sample contained 43.0% by volume of ethyl alcohol.

6. The trial court fully accepted the evidence of these witnesses and found that the prosecution succeeded in proving that the appellant was found in possession of 1.5 litres of illicit arrack at the place and time as alleged by the prosecution. The criticism against the evidence of these witnesses is that PW.4, the only independent witness turned hostile to the prosecution. There is no legal bar in accepting the evidence of the official witness or the investigating officers provided their evidence is free from doubt or infirmity. There is no infirmity in the evidence adduced by PWs.1, 2, 5 and 6. Hence, the trial court was justified in accepting their evidence.

7. The next question to be considered is regarding the contention

that the finding of the trial court that the appellant committed offence punishable under Section 55(a) of the Abkari Act is not tenable in the light of the decisions of this Court reported in **Surendran v. Excise Inspector, 2004(1) K.L.T. 404** and **Sudhepan @ Aniyan v. State of Kerala, 2005 (2) K.L.D.(Cri) 631**. In the above decisions, this Court had categorically held that to attract an offence under Section 55(a) of the Abkari Act, the prosecution must allege and prove that the accused was found in possession of arrack or any contraband articles in connection with export, import, transport or transit. The evidence adduced in this case would show that the appellant was found in possession of 1.5 litres of illicit arrack. But there is no evidence to show that the possession of the contraband articles was in connection with export, import, transport or transit. That apart, except production of a glass, no evidence was adduced to prove sale of arrack. In the above circumstances, the finding that the appellant committed offence punishable under Section 55(a) of the Abkari Act is liable to be set aside. But, the prosecution has succeeded in proving that the appellant was found in possession of 1.5 litres of arrack on the day of the incident. If so, what will be the offence for which the appellant can be convicted? As per Section 8(1) of the Abkari Act, possession of arrack in any form is punishable under Section 8(2) of the Abkari Act. The trial court found that the appellant was in possession of

1.5 litres of illicit arrack against the provisions of the Abkari Act. Hence, the appellant is liable to be convicted for the offence punishable under Section 8(1) read with Section 8(2) of the Abkari Act.

8. In the above circumstances, the appellant is convicted under Section 8(1) read with Section 8(2) of the Abkari Act. Considering the fact that the incident happened about seven years back and that the appellant was found in possession of only 1.5 litres of arrack, the appellant is sentenced to rigorous imprisonment for six months and to pay a fine of Rs.1,00,000/- and in default of payment of fine, to undergo simple imprisonment for a further period of three months. The appellant is also entitled to the benefit under Section 428 Cr.P.C.

With the above modification in the conviction and sentence, the appeal stands dismissed. The bail bonds executed by the appellant shall stand cancelled.

(K.THANKAPPAN, JUDGE)

sp/